No. 20-1334

In the Supreme Court of the United States

BRADLEY BOARDMAN, A WASHINGTON INDIVIDUAL PROVIDER, ET AL.

Petitioners,

v.

JAY R. INSLEE, GOVERNOR OF THE STATE OF WASHINGTON, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF THE BUCKEYE INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Petitioners are individual in-home care providers in Washington state who are situated identically to the quasi-public employees in *Harris v. Quinn*, 573 U.S. 616 (2014), and a non-profit organization dedicated to ensuring that workers understand their constitutional right not to subsidize union speech. After *Harris*, petitioners communicated with other providers to spread that message and to encourage them to oust one of their incumbent unions. Those efforts were initially quite successful, with large numbers of providers exercising their opt-out rights. But those efforts depended on access to state lists of providers and their contact information. Because providers are widely dispersed and have high turnover rates, only the state, which facilitates their payment, has that information. Even the incumbent unions depend on the state for that speech-enabling information. Frustrated by petitioners' success, the incumbent unions worked to convert the state's monopoly over that information into a duopoly. They drafted and bankrolled a ballot initiative amending Washington's public-records law to deny virtually *everyone but the incumbent unions* access to that information. Voters approved that initiative, and, over a 40-page dissent, the Ninth Circuit upheld it.

The question presented is:

Whether a law that skews the debate over the value of public-sector unions and undermines public-sector employees' opt-out rights by giving incumbent unions exclusive access to information necessary to communicate with public-sector employees is consistent with the First Amendment.

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INTEREST OF *AMICUS CURIAE*

This *amicus* brief is submitted by The Buckeye Institute (the "Buckeye Institute").[1] The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market solutions for Ohio's most pressing public policy problems. The staff at The Buckeye Institute accomplishes the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those public policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute is located directly across from the Ohio Statehouse on Capitol Square in Columbus, where it assists executive and legislative branch policymakers by providing ideas, research, and data to enable the lawmakers' effectiveness in advocating free-market public policy solutions. The Buckeye Institute is a non-partisan, nonprofit, tax-exempt organization, as defined by I.R.C. § 501(c)(3).

Through its Legal Center, the Buckeye Institute works to protect the First Amendment

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[1] Pursuant to Rule 37.2, all parties were notified of the Buckeye Institute's intention to file this brief at least 10 days prior to its filing. All parties consented to the filing. Pursuant to Rule 37.6, *Amicus Curiae* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae* or their counsel made a monetary contribution to the brief's preparation or submission.

rights of workers who object to being forced to subsidize union speech with which they disagree. In support of this aspect of its work, Buckeye filed amicus briefs on the merits in support of the petitioners in both *Friedrichs v. California Teachers Association*, Case No. 14-915, in the Supreme Court of the United States, *aff'd by an equally divided court*, 136 S. Ct. 1083 (2016), and in *Janus v. AFSCME,* 138 S. Ct. 2448 (2018), at both the certiorari and merits stages. Moreover, since *Janus,* Buckeye has challenged exclusive compulsory representation laws as violative of the First Amendment rights of public-sector employees. See, e.g., *Uradnik v. Inter Faculty Organization*, *et al.*, No. 18-719, in the Supreme Court of the United States, *cert. denied* (Apr. 29, 2019).

SUMMARY OF ARGUMENT

After the Court decided *Knox v. SEIU*, 567 U.S. 298 (2012), and *Harris v. Quinn*, 134 S. Ct. 2618 (2014), public sector union leaders recognized that they might need to become more responsive to their members. Unions thereafter have made efforts to communicate directly with in-home health care workers in order to maintain membership, and groups like Petitioner Freedom Foundation likewise made efforts to communicate directly with in-home healthcare workers to make sure that they knew about their First Amendment right not to subsidize union speech. After *Janus*, however, workers seeking to opt-out of their public sector unions have been met with a variety of state-sanctioned obstacles. The Washington Initiative at issue in this case is an egregious example of such an obstacle. It unconstitutionally favors one set of speakers with one

message and disfavors different speakers with a different message. This case presents this Court with an opportunity to protection it gave to the First Amendment rights of pubic-sector union members in *Janus*.

ARGUMENT

I. Introduction

This Court has declared, "Freedom of association . . . plainly presupposes a freedom not to associate." *Roberts v. United States Jaycees*,468 U.S. 609, 623 (1984). Likewise, this Court "has held time and again that freedom of speech 'includes both the right to speak freely and the right to refrain from speaking at all.'" *Janus*, 138 S. Ct. at 2643 (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)). The Washington Initiative dramatically limits the right of Petitioners not to associate and their freedom not to subsidize speech with which they do not wish to engage.

In *Janus*, the Court noted that governmental measures compelling speech are "at least as threatening" to constitutional free speech rights as governmental restrictions on what can be said. 138 S. Ct. at 2464. Compelled speech "coerce[s] people into betraying their convictions" even where a person is "compel[ed] to *subsidize* the speech of other private speakers." *Id*. (emphasis in original). Applying strict scrutiny, the Court held that nonconsenting workers cannot be compelled to pay agency fees to public sector unions to support their collective bargaining and other activities.

II. Communication with union members is essential to the objectives of both unions and groups promoting opt-out, and the Washington Initiative impermissibly favors union speech.

As a decision in *Janus* loomed, some public sector union leaders started to show a recognition that changes in their practices were needed. More particularly, they voiced a need to pay more attention to their membership.

In 2015, the Washington Post reported that "it took mortal danger for some unions to realize that they've taken their membership for granted." See Lydia DePillis, *The Supreme Court's Threat to Gut Unions is Giving the Labor Movement New Life*, The Washington Post (July 1, 2015).[2] One union activist explained, ""A lot of people lost faith in the union [AFSCME] because they haven't seen anyone." *Id.* Then-AFSCME President Lee Saunders candidly acknowledged: "We stopped communicating with people, because we didn't feel like we needed to." *Id.* The fear that nonmembers would be permitted to withhold their agency fees prompted union leaders to "reach [out to] workers who may have been paying agency fees for years and never had any contact with a union representative." Id.; see also Noam Schreiber, *A Power Broker Who Wants Labor at the Table, Not* on *the Menu*, The New York Times, (July 29, 2016)[3] ("Mr. Sanders has begun to address one huge vulnerability

[2] https://tinyurl.com/s79ssc4x.

[3] https://tinyurl.com/45jcc34z.

for public sector unions – the weakness of members' personal ties to one another and their leaders.").

In the same way, after the Court's 2014 decision in *Harris v. Quinn*, Secretary-General Gary Casteel of the United Auto Workers recognized the need for management to pay attention to members. He characterized right-to-work laws as a spur to activity, not a threat. Casteel explained, "[I]f I go to an organizing drive, I can tell these workers 'If you don't like this arrangement, you don't have to belong.' Versus, 'If we get 50 percent of you, then all of you have to belong whether you like it or not.' I don't even like the way that sounds, because it's a voluntary system, and if you don't think the system's earning its keep, then you don't have to pay." See Lydia DePillis, *Why* Harris v. Quinn *isn't as bad for workers as it sounds*, The Washington Post (July 1, 2014).[4]

Statements like those reflect the dynamic nature of the relationship between union leadership and a union's members. Members who feel that their union is providing value for their money are less likely to be disaffected. Two scholars note, "Items such as wages, fringe benefits, health insurance, and job security typically rank at the top of the members' lists of priorities. Job content and quality of work life issues come lower down. Political goals are quite low." Daniel G. Gallagher & George Strauss, *Union Membership Attitudes and Participation*, 1, 4 (Inst.

[4] https://tinyurl.com/pk2mup45.

Res. Lab. Emp., Working Paper #29-91 (1991).[5] Moreover, "to a surprising extent satisfaction is also strongly related to internal union process, for example, whether officers listen to the members, handle grievances fairly, and permit members to have a say in the union's governance." *Id.* at 20.

Moreover, "[o]nly 7 percent of private sector union members voted for their union." James Sherk, *One Person, One Vote, One Time? Re-election Votes Hold Unions Accountable to Their Members*, The Buckeye Institute (Sept. 16, 2016), at 2.[6] The other 93% inherited their union because the union was recognized as the exclusive bargaining agent long before the employees came to work. The UAW, for example, was recognized as the bargaining agent for General Motors in 1937. Present GM union members "inherit[ed]" their union, they did not choose it. *Id.*

The legacy phenomenon is not limited to private sector unions. Under an Ohio law that became effective in 1984, collective bargaining for Ohio state and local governmental bodies was required, and one-time secret ballot votes were conducted for unionizing governmental units. *Id.* at 2. The law also grandfathered in those unions already engaged in collective bargaining. *Id.* Neither the unions certified through the one-time elections nor those grandfathered in have had to stand for regular re-

[5] Available at
https://irle.berkeley.edu/files/https://irle.berkeley.edu/files/1991/Union-Membership-Attitudes-and-Participation.pdf.

[6] Available at
https://www.buckeyeinstitute.org/library/docLib/2016-09-05-One-Person-One-Vote-One-Time-By-James-Sherk.pdf

election. *Id.* The Columbus Education Association, which was formed in 1951 and began negotiating collective bargaining agreements in 1968, was recognized without an election and "represents almost everyone teaching in Columbus Public Schools without ever asking for or receiving their consent to do so." *Id.*

James Sherk identifies two consequences that flow from the lack of current union recognition, First, union officials lack any incentive to be responsive to member concerns. As Sherk explains, "unions do not have to cultivate workers' support to remain their representatives." *Id.* at 1. Second, that unresponsiveness produces member dissatisfaction with union leadership. More private sector and government union members disapprove of America's union leadership than approve of it. *Id.* at 4. More significantly, 72% believe union leaders should be held more accountable, 66% believe that union officials primarily look out for themselves, 63% consider union leaders overpaid, and 57% think union dues are too high for they value they generate. *Id.*

Like the unions, groups like Petitioner Freedom Foundation also began contacting in-home healthcare providers after *Harris*, and later *Janus*, to make sure that quasi-public employees were aware of their First Amendment right not subsidize union speech. These contacts especially important because the state entities responsible for these programs (and, in the *Janus* context, the public employers) frequently fail to provide adequate notice to in-home healthcare providers or public employees of these important constitutional rights. Petitioners found an audience

receptive to their message, until the Washington Initiative deprived them of the ability to contact the in-home healthcare providers.

The Washington Initiative impermissibly infringes on the First Amendment rights of Petitioners. The individual providers have the right to hear, and the Freedom Foundation has the right to speak. What the individual providers do with that information is up to them. They may optout or they may not. But they have the right to make that choice.

As Petitioners explain, the Washington Initiative unconstitutionally places the state's thumb on the scale. Pet. at 18-24. In *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011), the Court held that a Vermont law that operated in the same way represented unconstitutional viewpoint discrimination. That law disfavored both marketing speech and speech by pharmaceutical manufacturers. "As a result of these content- and speaker-based rules, detailers cannot obtain prescriber-identifying information, even though the information may be purchased or acquired by other speakers with diverse purposes and viewpoints." *Id*. at 564.

The Washington Initiative effectively allows one group of speakers with one message to speak, while discouraging speech by other viewpoints. As with the Vermont law in Sorrell, the Initiative "burdens disfavored speech by disfavored speakers." *Id*. The Initiative is subject to strict scrutiny, and it cannot meet that standard.

III. The Washington Initiative is part of a larger pattern of actions taken by state employers that deny employees the promise of *Janus*.

State employers across the country enforce requirements that impede the ability of workers to enjoy the First Amendment rights guaranteed by this Court in Janus. The Washington Initiative at issue in this case is one egregious example of such an obstacle. As Judge Bress pointed out in his dissent, "The State is effectively using an information embargo to promote the inherently 'pro-union' views of the incumbent unions, while making it vastly more difficult for those with opposing views—and particularly those with views opposite unions—to reach their intended audience." Pet. App. at 50.

While the Washington Initiative is a particularly flagrant example of a state making it more difficult for workers to exercise their Janus rights—in this case, by assuring that workers are exposed to only one favored viewpoint—it is part of a larger pattern of state employers engaging in actions that prevent the promise of *Janus* from being realized by workers.

Unreasonably short opt-out windows agreed to and enforced by public employers also serve as an obstacle to workers who want to exercise their First Amendment freedom not to associate. In anticipation of the *Janus* decision, numerous state employers agreed to new bargaining agreements that delayed opt out windows—in some cases for years—impeding the ability of union members to exercise their rights. See, e.g., Agreement Between the Ohio Assoc. of Pub. Sch. Employees/AFSCME/AFL-CIO and its Local

#642 and the Ripley Union Lewis Huntington Local School District Bd. of Educ., SERB Case No. 2017-MED-04-0572, July 1, 2017 (offering only one 10-day opt-out period more than three years after the effective date of the agreement).[7] In the days after the *Janus* decision, many employees were confronted with opt-out windows as short as six business days or with windows that occurred prior to the Janus decision, putatively foreclosing opt-outs until the next bargaining agreement. For example, several government unions required employees to deliver opt-out notices between December 22 and December 31, a period of only six business days at a time when the attention of the public is focused elsewhere. Agreement Between the Mahoning Cnty. Eng'r's Off. and the Teamsters Union Local 377, SERB Case No. 2017-MED-2-0138, Sept. 6, 2018.[8] And, for the Minerva Public School system, the opt-out window for a collective bargaining agreement that was adopted in 2017 was August 22 through August 31, 1991. Agreement Between Minerva Local Bd. of Educ. and Ohio Ass'n of Pub. School Emps., AFSCME/AFL-CIO Local 187, SERB Case No. 17-CON-02-2196, Oct. 20, 2017.[9]

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[7] Available at https://serb.ohio.gov/static/PDF/Contracts/2017/17-MED-04-0572.pdf.

[8] Available at https://serb.ohio.gov/static/PDF/Contratcts/2017/17-MED-02-0138.pdf.

[9] Available at https://serb.ohio.gov/static/PDF/Contratcs/2017/17-CON-02-2196.pdf.

In other cases, states have enforced policies that conflict with the principles announced in *Janus*. Jade Thompson, a Spanish teacher in Marietta, Ohio, resigned from her union because she opposes many positions the union had taken, both in collective-bargaining sessions and on policy matters more generally. But, as a condition of her employment as a public-school teacher, Mrs. Thompson is compelled by Ohio law to accept a labor union as her "exclusive bargaining representative" to speak for her on what this Court has characterized as "matters of substantial public concern." *Janus*, 138 S. Ct. at 2460. When Mrs. Thompson's late husband ran for public office, the union took out radio and television advertisements against him. The union's president also advocated against him in emails to Ms. Thompson and her colleagues at Marietta High School. In advocating against Mrs. Thompson's late husband, the union purported to speak for all teachers in the local school district, including Ms. Thompson. This assertion enjoyed the imprimatur of Ohio.

When Thompson went to court to object to the union's exclusive bargaining status, her claims were rejected. *Thompson v. Marietta Educ. Ass'n*, 972 F. 3d 809 (6th Cir. 2020).

The court recognized that Ohio's "take-it-or-leave-it system—either agree to exclusive representation, which is codified in state law, or find a different job" – was "in direct conflict" with the principles announced in *Janus*. *Id.* at 811. Even so, it concluded that the claim was barred by *Minnesota State Board for Community Colleges v. Knight*, 465

U.S. 271 (1984), because *Janus* left *Knight* "on the books." *Id*. at 812.

The result is that public workers like Ms. Thompson, whom *Janus* has recognized to have the right to be free from subsidizing a labor union's speech, may nonetheless be compelled to enter an expressive association with a union and to suffer its speaking for them, no matter their disagreement with the words it puts in their mouths. That is, if anything, a more severe impingement on First Amendment rights than that disapproved in *Janus*. It is unjustified by any state interest, let alone the compelling one required by strict or exacting scrutiny.

The Washington Initiative is of a kind with other state actions that at best impeded and at worst impinge on the First Amendment rights of workers guaranteed by *Janus*. This case presents an excellent vehicle to rein in a flagrant attempt by Washington to thwart the realization of the First Amendment rights recognized in *Janus*.

CONCLUSION

For the reasons stated in the Petition and this *amicus* brief, this Court should grant the writ of certiorari and, on review, reverse the decision of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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